

APPEAL NO. 032836
FILED DECEMBER 18, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on September 23, 2003. The hearing officer resolved the disputed issues by deciding that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the sixth and seventh quarters. The claimant appealed, contending that the hearing officer erred in not finding that he had no ability to work during the relevant qualifying periods due to his compensable injury. The respondent (carrier) asserts that sufficient evidence supports the hearing officer's decision.

DECISION

Affirmed.

The CCH record reflects that the claimant sustained a bilateral carpal tunnel injury as a result of performing his work activities with a date of injury of _____. The designated doctor evaluated the claimant in May 2001 and certified that the claimant reached maximum medical improvement on November 26, 2000, with a 17% impairment rating (IR) for impairment of the upper extremities. In a Benefit Dispute Agreement (TWCC-24) dated March 1, 2002, the parties agreed that the claimant's compensable injury includes a diagnosis of "psych/depression." After several letters of clarification were sent to the designated doctor, he recommended that a psychiatrist evaluate the claimant regarding impairment due to psychological conditions. The psychiatrist recommended by the designated doctor evaluated the claimant in May and September 2002 and determined that the claimant does not have symptoms of overt depression but does have a paranoid personality disorder unrelated to the compensable injury and assigned a zero percent IR for the "psychological/psychiatric aspect." The designated doctor agreed with the psychiatrist and did not alter his previous determination regarding the MMI date and the 17% IR for impairment of the upper extremities. Thus, the designated doctor assigned no impairment for a psychological/psychiatric condition. In Texas Workers' Compensation Commission Appeal No. 030668, decided April 17, 2003, the Appeals Panel affirmed the hearing officer's decision that the claimant's IR is 17% as certified by the designated doctor. The claimant's attorney represented that the IR decision has been appealed to the district court. Section 410.202(b) provides that the decision of the Appeals Panel is binding during the pendency of an appeal.

With regard to the SIBs issue, eligibility criteria for SIBs entitlement are set forth in Section 408.142(a) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102 (Rule 130.102). The SIBs criterion in issue is whether the claimant made a good faith effort to obtain employment commensurate with his ability to work during the qualifying periods for the sixth and seventh quarters. The claimant contends that he had no ability to work during the relevant qualifying periods as a result of his depression and/or psychological

conditions resulting from his compensable injury. It is undisputed that the claimant did not work or look for work during the relevant qualifying periods.

Rule 130.102(d)(4) provides that an injured employee has made a good faith effort to obtain employment commensurate with the employee's ability to work if the employee has been unable to perform any type of work in any capacity, has provided a narrative report from a doctor which specifically explains how the injury causes a total inability to work, and no other records show that the injured employee is able to return to work. Rule 130.102(e) provides in part that, except as provided in subsection (d)(1), (2), (3), and (4) of Rule 130.102, an injured employee who has not returned to work and is able to return to work in any capacity shall look for employment commensurate with his or her ability to work every week of the qualifying period and document his or her job search efforts. The hearing officer determined that the claimant did not meet the requirements of Rule 130.102(d)(4) to show a total inability to work, that the claimant had some ability to work during the relevant qualifying periods, and that the claimant did not make a good faith effort to obtain employment commensurate with his ability to work during the relevant qualifying periods. The hearing officer concluded that the claimant is not entitled to SIBs for the sixth and seventh quarter.

Whether the claimant met the good faith criterion for SIBs entitlement was a fact question for the hearing officer to resolve from the conflicting evidence presented at the CCH. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves the conflicts in the evidence and determines what facts have been established. The Appeals Panel has noted that medical evidence from outside the qualifying period may be considered by the hearing officer, insofar as the hearing officer finds it probative of conditions in the qualifying period in issue. Texas Workers' Compensation Commission Appeal No. 030719, decided April 30, 2003. With regard to the claimant's assertion regarding the carrier's failure to comply with Rule 130.108(a), we note that there is no evidence that the carrier did not compare the factual situation of qualifying periods of the prior quarters with the factual situation of the current qualifying periods. In addition, the Appeals Panel has held that a carrier's failure to make such a comparison would involve a matter for the Division of Compliance and Practices and would not be grounds for finding reversible error. Texas Workers' Compensation Commission Appeal No. 021366, decided July 1, 2002; Texas Workers' Compensation Commission Appeal No. 031555, decided July 22, 2003.

When reviewing a hearing officer's decision for factual sufficiency of the evidence, we should reverse such decision only if it is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Texas Workers' Compensation Commission Appeal No. 031052, decided June 19, 2003. Although there is conflicting evidence in this case, we conclude that the hearing officer's decision is supported by sufficient evidence and that it is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

We affirm the hearing officer's decision and order.

The true corporate name of the insurance carrier is **AMERICAN PROTECTION INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
800 BRAZOS
AUSTIN, TEXAS 78701.**

Robert W. Potts
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Thomas A. Knapp
Appeals Judge